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No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF
OKLAHOMA CITY PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 89,
OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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Counter-Statement of Question Presented for Review

A single question arises on the facts of this case:

May a school district that obeys a federal court order requiring it to implement a new student assignment plan to accomplish desegregation be permitted, consistent with the Fourteenth Amendment, to dismantle that plan, and thereby to re-create the all-black schools whose elimination was the purpose of the court order, when the uncontroverted evidence demonstrates that the conditions that made the order necessary (racial residential segregation that the court determined to have resulted from official state action including action of the school authorities) yet persist?

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In the
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October Term, 1989

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THE BOARD OF EDUCATION OF
OKLAHOMA CITY PUBLIC SCHOOLS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The decision of the Court of Appeals, reprinted at Pet. App. 1a-113a, is now reported at 890 F.2d 1483 (10th Cir. 1989).[1]

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[1]Earlier reported opinions in this matter are found at 219 F. Supp. 427 (W.D. Okla. 1963); 244 F. Supp. 971 (W.D. Okla. 1965),

(continued...)

Statement

The Oklahoma City school district for generations maintained a racially discriminatory, dual and segregated school system.[2] In 1955 the school board eliminated separate, overlapping attendance boundaries for black and white students but because of segregated residential patterns – which the district court in this case found to have been caused by official action including the actions of school authorities[3] – the school zones which the board drew perpetuated all-black, segregated schools in the

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[1](...continued)

modified and aff'd, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); 396 U.S. 269 (1969); 307 F. Supp. 583 (W.D. Okla.), *aff'd*, 430 F.2d 865 (10th Cir. 1970); 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); 606 F. Supp. 1548 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[2]*Dowell*, 219 F. Supp. 427, 431-34 (W.D. Okla. 1963). [Earlier reported opinions in this action are cited simply as "*Dowell*."]

[3]*Dowell*, 219 F. Supp. at 433-34; *id.*, 244 F. Supp. 971, 975-76 (W.D. Okla. 1965); *see also id.*, 677 F. Supp. 1503, 1506 (W.D. Okla. 1987), *rev'd*, 890 F.2d 1483 (10th Cir. 1989), Pet. App. 5b-6b.

"northeast quadrant" of the city.[4] In 1972, after the board failed to submit an effective plan,[5] the district court ordered the system to implement the "Finger Plan" utilizing pairing and clustering of school facilities to desegregate the public schools.[6]

In 1977 the district court "terminated" its supervisory jurisdiction but did not vacate its 1972 order, specifically noting that "the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the [Finger] Plan."[7] However, in 1984

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[4]*Dowell*, 244 F. Supp. at 975.

[5]The trial court repeatedly allowed the school board additional time to submit an effective desegregation plan. *See Dowell*, 244 F. Supp. 971 (W.D. Okla. 1965), *modified and aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); *id.*, 396 U.S. 269 (1969)(reversing delay in implementing secondary plan); *id.*, 307 F. Supp. 583 (W.D. Okla.), *aff'd*, 430 F.2d 865 (10th Cir. 1970)(approving secondary plan).

[6]*Dowell*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 2041 (1972).

[7]The 1977 order is reprinted *infra*, Appendix pp. 1a-4a.

the school board decided to return the system's elementary schools to the geographic attendance zoning system it had devised in 1955. The result was the creation of ten elementary schools having virtually all-black enrollments (each of which had been virtually all-black prior to the 1972 order and each of which had been integrated from 1972 to 1984), to which more than 40% of all black elementary students in the Oklahoma City public schools were assigned.[8]

Plaintiffs sought to reopen the litigation to challenge this elementary school resegregation. The district court denied plaintiffs' request and held the 1984 elementary attendance plan constitutional,[9] but the Court of Appeals reversed and remanded with instructions that

[8]See *Dowell*, 890 F.2d at 1511 n.5 (dissenting opinion). The eleventh virtually all-black elementary school, North Highland, was 50% black in 1972, PX 12, Tr. [of June 15-24, 1987 hearing] 30, 32.

[9]*Dowell*, 606 F. Supp. at 1557.

the trial court should consider whether the 1972 injunction should be modified or dissolved, placing the burden upon the school board to "present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the order."[10]

On remand, the school board

> assert[ed] that over time the substantial demographic changes in Oklahoma City rendered the Finger Plan inequitable and oppressive. The resulting inequity, the Board contend[ed], was the primary factor motivating its adoption of the new student assignment plan at the elementary level.[11]

The board also claimed that as a result of these changes, current residential patterns in the district no longer reflected the impact of the severe, interrelated housing and school segregation that the Finger Plan was intended

[10]*Dowell*, 795 F.2d at 1523.

[11]*Dowell*, 606 F. Supp. at 1513, Pet. App. 19b.

to neutralize.[12] These changes, the board contended, warranted the complete dissolution of injunctive relief.

The district court agreed with these contentions. It concluded that although the 1984 plan re-instituted the same attendance zones that had been used prior to the 1972 order,[13] and although it re-created the very same all-black elementary schools in the "northeast quadrant" of Oklahoma City that had existed prior to that order, nevertheless there was no re-establishment of the dual school system. The court reached this judgment by making two findings. It first "unlink[ed] the Board from existing residential segregation,"[14] holding the

[12]"Defendants' expert . . . was satisfied that the residential pattern that developed in the District since implementation of the Finger Plan was not a vestige of what had occurred thirty-five or forty years before," *Dowell*, 890 F.2d at 1487.

[13]*Dowell*, 677 F. Supp. at 1517, Pet. App. 28b.

[14]*Dowell*, 890 F.2d at 1488, Pet. App. 9a.

discriminatory acts that it had earlier recognized as the cause of pre-1972 residential racial separation[15] had become attenuated as a result of the repeal of discriminatory statutes and ordinances and the passage of fair housing legislation.[16] The court then concluded that the board's adoption of the 1984 plan was not motivated by "discriminatory intent."[17]

Turning to the question whether the injunction should be dissolved or modified, the district court held that the purposes of the 1972 order had been achieved since

> the school district's continued adherence to the fundamental tenets of the Finger Plan at all grade levels through school year 1984-85 further insured

[15]See *supra* note 3.

[16]*Dowell*, 677 F. Supp. at 1511, Pet. App. 15b.

[17]*Dowell*, 677 F. Supp. at 1516, Pet. App. 25b.

> that all vestiges of prior state-imposed segregation had been completely removed[18]

and since

> *the Oklahoma City Board of Education is not responsible for the present state of residential segregation in Oklahoma City.*[19]

The court below again reversed. It held that the district court "clearly erred in its findings of fact and consequent legal determinations":

> [A]lthough there is evidence to facially support the district court's findings, *on the entire evidence* we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Because the court failed to address or distinguish plaintiffs' contrary evidence, and because the court cast the evidence on which it relied in a form to provide an answer to the single question of discriminatory intent, we are convinced that the basis on which the court fashioned dissolution of the injunction was flawed.[20]

The starting point for the Court of Appeals' analysis was its recognition that, although the district court used the term "unitary" to describe the Oklahoma City school system in 1977 (at a time when the Finger Plan was still being fully implemented), it had not at that time vacated the 1972 injunction but simply terminated its active jurisdiction over the case.[21] In those

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[18]*Dowell*, 677 F. Supp. at 1522, Pet. App. 38b.

[19]*Dowell*, 677 F. Supp. at 1521, Pet. App. 36b [emphasis in original].

[20]*Dowell*, 890 F.2d at 1504, Pet. App. 41a [emphasis in original]. At the beginning of its opinion (890 F.2d at 1488, Pet. App. 10a-11a), the panel majority enunciated the standard of review which it was applying:

> [O]ur review focuses on whether the district court abused its discretion in granting the Board's motion to dissolve the injunction and denying plaintiffs' motion to modify the relief. On appeal we will not disturb the district court's determination except for an abuse of discretion. *Securities and Exch. Comm'n v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677 (10th Cir. 1988). The district court's exercise of discretion, however, must be tethered to legal principles and substantial facts in the record. *Evans v. Buchanan*, 582 F.2d 750, 760 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

[21]The district court's action was thus similar to measures adopted by other courts to provide a greater degree of discretion for

(continued...)

circumstances, as the Court of Appeals had previously held, the school board was entitled to dissolution of injunctive relief only upon a showing that "the law or the

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[21](...continued)

local school boards while retaining protections for the rights of plaintiffs. *E.g.*, *Keyes v. School District No. 1*, 670 F. Supp. 1513, 1515 (D. Colo. 1987)(court "recognized the need for modification of the existing court orders to relax court control and give the defendants greater freedom to respond to changing circumstances and developing needs in the educational system"), *aff'd*, Nos. 85-2814 & 87-2634 (10th Cir. January 30, 1990); *Swann v. Charlotte-Mecklenburg Board of Education*, Civ. No. 1974 (W.D.N.C. July 11, 1975), slip op. at 2 ("This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed. The court does not anticipate any action by the defendants to justify a re-opening; does not anticipate any motion by plaintiffs to re-open; and does not intend lightly to grant any such motion if made. This order intends therefore to close the file; to leave the constitutional operation of the schools to the Board, which assumed that burden after the latest election; and to express again a deep appreciation to the Board members, community leaders, school administrators, teachers and parents who have made it possible to end this litigation").

The 1977 order in this case included no finding that all vestiges of prior discrimination had been completely eliminated. It stated only that "substantial compliance with the constitutional requirements has been achieved," adding that the court did not expect that relinquishing active jurisdiction "will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years" of the litigation." *See infra*, pp. 1a-4a.

underlying facts have so changed that the dangers prevented by the injunction 'have become attenuated to a shadow."' *Dowell*, 890 F.2d at 1489-92 and 795 F.2d at 1521, both citing *United States v. Swift & Company*, 286 U.S. 106 (1932).

Although there were changed conditions,[22] the court below concluded that they did not warrant dissolution of all injunctive relief:

> The issue then becomes whether the Board's action in response to the changed conditions has the effect of making the District "*un*-unitary" by reviving the effects of past discrimination. . . . [T]he evidence indicates the Board's implementation of a "racially neutral" neighborhood student assignment plan has the effect of reviving those conditions that necessitated a remedy in the first instance. Under these circumstances the expedient of finding unitariness does not erase the record or represent that substantial change in the law or facts to warrant overlooking the effect of the Board's actions.[23]

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[22]*Dowell*, 890 F.2d at 1498, Pet. App. 30a.

[23]*Dowell*, 890 F.2d at 1499, Pet. App. 31a-32a.

Instead, the case was remanded with instructions to modify prior decrees in light of the changed circumstances and of the objectives they were intended to achieve.[24] It is that determination which the board now asks this Court to review.

[24]*Dowell*, 890 F.2d at 1504-06, Pet. App. 41a-45a.

REASONS FOR DENYING THE WRIT

I. THE APPARENT CONFLICT AMONG THE CIRCUITS REFLECTS FACTUAL DIFFERENCES LIMITED TO A FEW CASES AND DOES NOT WARRANT REVIEW BY THIS COURT

This matter, *Riddick v. School Board*,[25] and *United States v. Overton*[26] are *sui generis*, as we explain below. Since the time in the mid-1980's when they were initially litigated, their unique circumstances have not recurred in other suits. For this reason, any apparent conflict among the Courts of Appeals in these decisions does not warrant review by this Court, especially since there is broad consensus in the lower courts on the underlying substantive principles.

[25]784 F.2d 521 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[26]834 F.2d 1171 (5th Cir. 1987).

In each of the three enumerated cases, a federal district court had, at some point in the past, used the term "unitary" to describe the school district involved.[27] In each of the cases, the school system in question thereafter dismantled, in its elementary grades, the desegregation plan that it had previously been ordered to implement, and that had made it possible even to consider application of the term "unitary" to its public schools. The issue presented to the federal courts in the renewed litigation which followed was whether such dismantling was consistent with the Fourteenth Amendment obligations of school authorities that had originally prompted the issuance of desegregation injunctions.

The Courts of Appeals reached different results in the cases. In *Overton* and *Riddick* the parties' consent to the "unitary" finding was treated as controlling and as the equivalent of a judgment that all vestiges and effects of the school authorities' prior discriminatory conduct had

[27] In *Riddick* the finding was embodied in a consent decree dismissing the predecessor school desegregation action "with leave to any party to reinstate this action for good cause shown." *See* 784 F.2d at 525. In *Overton* the parties entered into a consent decree providing that after three years, unless there was objection the school district "shall be declared to be a unitary school system and this case shall be dismissed." *See* 834 F.2d at 1171. (There was such an objection but it was withdrawn pursuant to a further stipulation, thus triggering dismissal pursuant to the consent decree when the stipulation was effectuated. *Id.* at 1173-74.) In *Dowell*, as we have noted, the word was used in one sentence of a 1977 order terminating active jurisdiction but not referring to or vacating prior injunctive decrees.

In the only other arguably similar case of which Respondents are aware, *Lee v. Talladega County Board of Education*, No. 88-7471 (11th Cir. argued August 9, 1989), the district court in 1985 endorsed as "Approved" and "Entered" a Joint Stipulation of Dismissal signed by all parties. The Joint Stipulation incorporated by explicit reference a resolution of the school board in which it committed itself to continue to comply with all prior court orders in the case. On the same date, the district court entered a separate Judgment and Order dismissing the case "in view of" the Stipulation and reciting that the district had achieved "unitary status." Neither the Joint Stipulation nor the Judgment and Order vacated or dissolved prior orders. The present appeal in that matter turns on construction of the Order, the Stipulation and the incorporated resolution.

been completely eliminated.[28] In *Dowell* the Court of Appeals did not view the "unitary" phrasing of the 1977 order in the same light; although the plaintiffs had not appealed the entry of the 1977 order and it was therefore to be given *res judicata* effect,[29] the Court of Appeals found the failure of the district court to have explicitly vacated its prior decree in 1977 to be quite significant.[30] Since the 1972 order remained in effect, the Court held, it could subsequently be dissolved only upon

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[28]In *Riddick* the consent order recited "that racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now 'unitary,'" *see* 784 F.2d at 521. In *Overton* the consent decree embodied the minimum three-year period of retained jurisdiction, and the opportunity for plaintiffs to make objection and present evidence of continued vestiges of discrimination counter-indicating dismissal, that the Fifth Circuit had previously established as the proper procedure to be followed in ending school desegregation suits. *See* 834 F.2d at 1175 n.12, 1177 n.20 & accompanying text.

[29]*Dowell*, 795 F.2d at 1522.

[30]As noted, the district court had stated in 1977 that it did not expect its termination of active jurisdiction to result in any dismantling of the Finger Plan.

a showing, consistent with the traditional equity standards enunciated in *Swift*, that the conditions which gave rise to its entry in 1972 had so changed that its continuance was no longer necessary to ensure the constitutional rights of the plaintiffs for whose protection it had issued.

Petitioners advance a conflict among the Circuits with respect to the significance of a "unitary" finding and with respect to the applicability of the *Swift* standard as matters meriting the attention of this Court. We respectfully submit, however, that the *judgments* in the three cases are not mutually inconsistent, and that there is now, in fact, wide agreement among the lower federal courts on the governing legal principles in this area. Accordingly, discretionary review of the decision below is unnecessary.

In *Riddick* and *Overton* the plaintiffs' consent (or withdrawal of objections) to determinations that the

effects of prior discrimination had been eliminated was held controlling, as previously noted. In *Dowell* the Court of Appeals was unable to harmonize the district court's incidental use of the term "unitary" with its failure to dissolve the prior injunctive relief, and for this reason held that the injunction remained in force and could only be vacated on the basis of the traditional *Swift* showing.

While the *Overton* court, in *dictum*,[31] expressed disagreement with *Dowell*, that disagreement turned upon the *Overton* panel's assumption that the 1977 order in the instant case was "a final declaration that the school

[31]The first reason given by the Court of Appeals in *Overton* for upholding the district court's refusal to enforce the prior consent decree was that the decree "expired by its own terms." 834 F.2d at 1174. Since that was a completely sufficient basis on which to affirm the district court's judgment, the subsequent discussion of *Riddick* and *Dowell* in the opinion was unnecessary and is *dictum* -- especially since the panel's interpretation of the consent decree's terms avoided the need to decide issues of constitutional magnitude concerning the scope and duration of the remedy for operating a dual school system. *See United States v. Henry*, 709 F.2d 298, 310 (5th Cir. 1983)("It is well settled . . . that a federal court should not reach a constitutional question if the case may be disposed of on statutory or other nonconstitutional grounds").

district [was] unitary."[32] On strikingly similar facts, however, the author of the *Overton* opinion has recognized that the mere usage of the word "unitary" does not always constitute such a "final declaration that the school district is unitary." *See Monteilh v. St. Landry Parish School Board*, 845 F.2d 625, 629 (5th Cir. 1988)("because our procedures had not been followed before the court in 1971 declared St. Landry to be unitary, we find that neither the district court nor the panel affirming its order intended to declare that the district was unitary, in the sense of having eliminated all vestiges of past discrimination").

The same approach, involving fact-bound analysis of the history of an action rather than the attribution of talismanic significance to the word "unitary," has been taken in numerous cases decided by several of the

[32]*See* 834 F.2d at 1174.

federal judicial Circuits.[33] As the Court of Appeals for the Eleventh Circuit aptly summarized the situation:

> Some confusion has been generated by the failure to adequately distinguish the definition of a "unitary" school system from that of a school district which has achieved "unitary status." As used in this opinion, a unitary school system is one which has not operated segregated schools as proscribed by cases such as *Swann* and *Green* for a period of several years. A school system which has achieved unitary status is one which is not only unitary but has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures.[34]

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[33]*E.g.*, *School Board of Richmond v. Baliles*, 829 F.2d 1308, 1311 n.1 (4th Cir. 1987)("We recognize that there is dictum in our 1972 opinion stating that this was a unitary system. That issue, however, was not properly before the appeals court in 1972 and, as explained by the district court in the instant litigation, the facts in 1972 might not have supported a finding that RPS had achieved unitary status at that time"); *United States v. Lawrence County School District*, 799 F.2d 1031, 1037 (5th Cir. 1986)("The use of the word 'unitary' in the *Alexander* opinion, like its repetition in the 1974 order, did not imply a judicial determination that the school system had finally and fully eliminated all vestiges of *de jure* segregation"); *Pitts v. Freeman*, 755 F.2d 1423, 1426 (11th Cir. 1985)("As the defendants suggest, it is possible that the district court did not intend its use of the word 'unitary' to be equated with the unitary status that requires dismissal of the action").

[34]*Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985). What had always been

(continued...)

Thus, the conflict between *Riddick* and *Overton*, on the one hand, and the instant case, on the other, turns not upon the consequences of a true determination of "unitary status" but upon the differing interpretations given by the Courts of Appeals in each case to the earlier orders in which the term "unitary" was used.

No legal issue warranting the grant of *certiorari* here is presented by such case-specific differences in interpretation of lower court orders. Since the Courts of Appeals' 1986 and 1987 decisions in the three cases, no other school systems have sought to dismantle their desegregation plans. And there is virtual unanimity

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[34](...continued)

clear was that *premature dismissal* of cases, before it was clear that plans had been effective and the vestiges of discrimination had been eradicated, was improper. *Raney v. Board of Education of Gould*, 391 U.S. 443, 449 (1968); *Youngblood v. Board of Public Instruction of Bay County*, 448 F.2d 770 (5th Cir. 1971); *see also Lemon v. Bossier Parish School Board*, 444 F.2d 1400, 1401 (5th Cir. 1970).

among the lower federal courts today[35] about the

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[35]*See Keyes v. School District No. 1*, Nos. 85-2814 & 87-2364 (10th Cir. January 30, 1990), slip op. at 13-14 ("This court has defined 'unitary' as the elimination of invidious discrimination and the performance of every reasonable effort to eliminate the various effects of past discrimination"); *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d 945, 951-52 (11th Cir. 1989)(Supreme Court "cases make clear that no previously segregated school system can be declared to have achieved unitary status as long as there is continued segregation . . . . A declaration of unitary status is also inappropriate when the evidence shows that school authorities have not consistently acted in good faith to implement the objectives of the plan"); *School Board of Richmond v. Baliles*, 829 F.2d at 1312 (affirming district court finding of unitary status after considering evidence on factors "other than those relating to student body composition or school operations" that parties had urged district court to consider in addition to the six factors enumerated in *Green*); *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987)("Unitary status is not simply a mathematical construction. One non-quantitative factor of particular significance is whether the school defendants have a sufficiently well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular to indicate that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention"); *United States v. Lawrence County School District*, 799 F.2d at 1037 ("The use of the word 'unitary' in the *Alexander* opinion, like its repetition in the 1974 order, did not imply a judicial determination that the school system had finally and fully eliminated all vestiges of *de jure* segregation . . . Because the potential consequences of a judicial declaration that a school system has become unitary are significant, this court has required district courts to follow certain procedures before declaring a school system unitary"); *United States v. Texas Education Agency*, 647 F.2d 504, 508-09 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

underlying *substantive* principle: that a school district which had been made subject to a desegregation order should be found to have attained "unitary status," entitling it to a dismissal, only a careful hearing and review of all aspects of its operations to insure that all vestiges of prior discrimination have been extirpated.[36] In light of that understanding, and of the collateral consequences which have, after *Riddick*, flowed from a "unitary" finding, the label is no longer lightly applied to a district, and determinations of "unitariness" are often contested and are subject to careful scrutiny.[37]

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[36]Petitioners do not contest that standard; rather, they contend that they meet it. The court below overturned the district court's finding that the school system was "unitary" after implementation of the elementary plan adopted in 1984 as "clearly erroneous," a matter we address *infra* in Argument II.

[37]*See, e.g., Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d at 953 (reversing district court's "unitariness" finding as clearly erroneous); *Keyes v. School District No. 1*, Nos. 85-2814 & 87-2634 (10th Cir. January 30, 1990)(affirming finding of district court

(continued...)

Nor does any meritorious issue arise from the articulation, by the court below, of the *Swift* standard to govern dissolution of school desegregation decrees.[38] A proper finding of "unitary status," signifying that all vestiges of prior discrimination have been eliminated, by definition meets the *Swift* standard because it encompasses a determination that there are no lingering effects of the prior violation that might cause its recurrence if injunctive relief is vacated. The *Swift* standard thus does not extend "a federal court's

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[37](...continued)

that district was not "unitary" as to student assignments), *aff'g* 609 F. Supp. 1491 (D. Colo. 1985); *United States v. Texas [San Felipe del Rio Consolidated School District]*, No. 89-1304 (5th Cir. December 6, 1989)[unpublished](affirming district court finding that school system had achieved unitary status).

[38]The Tenth Circuit has approved *modification* of a decree based on criteria other than the *Swift* standard. *Keyes v. School District No. 1*, Nos. 85-2814 & 87-2634 (10th Cir. January 30, 1990), slip op. at 22 (endorsing "interim decree" as "commendable attempt to give the board more freedom to act within the confines of the law"), *aff'g* 670 F. Supp. 1513 (D. Colo. 1987).

regulatory control of [public school] systems . . . beyond the time required to remedy the effects of past intentional discrimination," *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring).[39]

II. THE COURT BELOW PROPERLY APPLIED THE "CLEARLY ERRONEOUS" RULE

Petitioners suggest that the decision of the court below conflicts with the ruling in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) and misapplies the "clearly erroneous" rule. However, the features of the Court of Appeals' analysis in *Anderson* which led this Court to

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[39]In *Spangler*, "the evidence presented to the district court in support of the motion for termination of jurisdiction showed that the effects of the Board's pre-1970 discrimination have been eliminated," *id.* at 1243 (Kennedy, J., concurring). Unlike in the present case, the district court in *Spangler* had never made a finding that the school board's discriminatory student assignment and transfer practices had contributed to racial residential segregation in the school district. *See Spangler*, 311 F. Supp. 501, 507-13 (C.D. Cal. 1970).

grant review and to reverse the ruling in that case are not present in the instant matter.

To begin with, Petitioners are incorrect in their assertion that the court below "struck down the district court's intent finding" (Pet. 25). Rather the court examined the evidence "to decide if the district court correctly found the Plan maintained unitariness[40] in student assignments" and "on this basis . . . conclude[d that] the district court clearly erred in its findings of fact and consequent legal determinations."[41] The inquiry conducted by the court below was consistent with its application of the *Swift* standard to the question whether

[40]"A declaration that a school has achieved unitary status is a finding of fact subject to review under the clearly erroneous standard. *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. Unit A 1981), *cert. denied*, 454 U.S. 1143 (1982); *accord Riddick v. School Bd.*, 784 F.2d 521, 533 (4th Cir. 1986)." *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d at 952 n.3.

[41]890 F.2d at 1503-04, Pet. App. 40a-41a.

the injunction should have been dissolved by the district court in 1987 and focused on the question whether vestiges of the prior discrimination remained intact.[42]

Unlike *Anderson*, where the Court of Appeals effectively substituted its own credibility determination for that of the district court in intepreting the testimony of a witness,[43] or drew a different inference than the district court from the subsidiary facts on which the district court relied,[44] here the panel majority found the district court's "unitariness" finding wanting because it was based upon an incomplete view of the *uncontroverted facts* established by the record and because it was substantially shaped by

[42]*See Dowell*, 890 F.2d at 1493 n.19 ("the question of continued unitariness of the District . . . was the key factual controversy in this case. . . . Whether the District was unitary before circumstances changed is irrelevant to whether the decree should be amended or vacated. Indeed, whether the District remains unitary in light of changed circumstances is a wholly different question").

[43]*Anderson*, 470 U.S. at 577-79.

[44]*Id.* at 576-77.

the lower court's view that controlling legal significance was to be accorded the board's intent in adopting the 1984 plan.[45] This holding by the majority below is unexceptionable. *Dayton Board of Education v. Brinkman* [*Dayton II*], 443 U.S. 526, 534-37 (1979).

Petitioners and the dissenting member of the panel fundamentally mischaracterize the basis of the ruling below in suggesting that the majority disagreed with the district court's choice between "two permissible views of the evidence."[46] That is not what the panel majority meant by its statement that "there is evidence to *facially* support the district court's findings."[47] When that language is read in the context of the remainder of the sentence in which it appears, and of the following textual

[45] *See Dowell*, 890 F.2d at 1503-04, Pet. App. 41a.

[46] Petition at 25, citing *Anderson*, 470 U.S. at 574.

[47] *Dowell*, 890 F.2d at 1504, Pet. App. 41a [emphasis added].

sentence,[48] the meaning is evident: a *selective* view of the record evidence, as recited and referenced in the district court's opinion was not antithetical to its finding, but considering the "*entire evidence*," the finding was clearly erroneous. No question warranting the grant of *certiorari* is raised by the holding of the court below.

III. ON THE FACTS OF THIS CASE, THE JUDGMENT BELOW MUST BE AFFIRMED BECAUSE THE BOARD'S PUPIL ASSIGNMENT PLAN PERPETUATES THE RACIALLY DISCRIMINATORY EFFECTS OF THE DUAL SYSTEM

Even if the legal issues raised by Petitioners appeared to be more significant than they are, this case would be an inappropriate vehicle in which to explore them. The record evidence in this action compels the conclusion that the school board's 1984 elementary-grade

[48] The passage is set out *supra* at pp. 8-9.

pupil assignment plan, re-imposing pre-1972 geographic attendance zones, perpetuates the racially discriminatory effects of the dual school system whose elimination is the goal of this lawsuit. Under these circumstances, the district court's finding of "unitariness" is inconsistent with this Court's school desegregation jurisprudence from *Brown*[49] to *Swann*,[50] *Keyes*,[51] and *Columbus*.[52]

A. The ten virtually all-black schools reestablished by the school board's 1984 plan are the same schools that were identified by the district court in 1972 as "substantially disproportionate in their racial composition," as not having "lost their racial identity" and as indicating

[49]*Brown v. Board of Education*, 347 U.S. 483 (1954); *id.*, 349 U.S. 294 (1955).

[50]*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[51]*Keyes v. School District No. 1*, 413 U.S. 189 (1973).

[52]*Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

that "the dual system of the School District remains unaffected."[53] These and other schools for black children that were operated under the dual system were "centrally located in the Negro section of Oklahoma City, comprising generally the central east section of the city."[54] Thus the 1984 plan reestablished the pattern of *de jure* segregation in the same place and by the same method that existed prior to the district court's 1972 order.[55] It is utterly illogical and at war with the principles of the *Brown* decision to permit a school district, that for generations maintained a racially dual school system, to revert to the same method of operating

[53]*Dowell*, 338 F. Supp. at 1260, 1265. [Harmony Elementary School was renamed King Elementary School in 1974-75.]

[54]*Dowell*, 219 F. Supp. at 433-34. *See Swann*, 402 U.S. at 21.

[55]The present case is therefore distinguishable from *Riddick*, in which the new plan's "attendance zones were gerrymandered so as to achieve maximum racial integration," 784 F.2d at 527.

virtually all-black schools built in pursuance of that dual school system.

It is one thing to say, as this Court did in *Swann*, that when a district court has required implementation of an effective desegregation plan, further modification by the court should not be necessary "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."[56] It is quite another to read this language, as do Petitioners, to insulate school boards completely from any responsibility for resegregation that accompanies deliberate board action dismantling that plan. *See Pasadena Board of Education v. Spangler*, 427

[56]402 U.S. at 32.

U.S. 424, 435-36 (1976).[57] Indeed, this Court's decisions have explicitly charged school boards and district courts with the responsibility for avoiding resegregative actions: In *Swann*, the Court referred to "the classic pattern of building schools specifically intended for Negro or white students" as a "factor of great weight"; and cautioned that in remedying the constitutional violation of official segregation,

[57]In *Pasadena*, this Court said:

> There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants. . . . [A] quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But as these shifts were not attributed to any segregative actions on the part of the petitioners, we think this case comes squarely within the sort of situation foreseen in *Swann*.

Accord Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987)(vacating order under which "school defendants will be required for an indefinite period to *maintain* specific racial mixes in the city's schools, much like the balances they have been required to *achieve* during the 12 years in which the district court actively controlled the desegregation process" by altering assignments each year to attain targeted enrollment ratios, *id.* at 317 n.3).

> it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system.[58]

And in *Dayton II*, the Court repeated that school boards that previously operated dual school systems had "an affirmative responsibility to see that *pupil assignment policies* and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'"[59]

The court below faithfully applied the teaching of this Court's decisions in refusing to endorse the board's resegregative 1984 elementary school plan, and review by this Court of its determination is unnecessary.

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[58]402 U.S. at 21.

[59]443 U.S. at 538 (emphasis added and citation omitted).

B. As if recognizing these principles, Petitioners and the district court[60] sought to establish that Oklahoma City school officials' past discrimination had "become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention."[61] *See* Petition at 9. As this Court framed the inquiry in *Keyes*, 413 U.S. at 211:

> [A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove [past] segregative intent, it can rebut the *prima facie* case only by showing that its past segregative acts did not create or contribute to the current

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[60]Except for the addition of footnote 4, Respondents are aware of no material differences between Petitioners' Proposed Findings of Fact and Conclusions of Law submitted to the district court on September 29, 1987 and the Memorandum Opinion of the trial court.

[61]*Dowell*, 677 F. Supp. at 1513, Pet. App. 18b, *quoting Keyes*, 413 U.S. at 211.

> segregated condition of the [virtually all-black] schools.

The district court found that although racially differentiated residential patterns in Oklahoma City originally reflected "past governmental barriers," some blacks had moved into formerly all-white census tracts after 1960, demonstrating the "removal of past governmental barriers."[62] The court then determined that the continuing virtually all-black character of the "northeast quadrant" of the city was attributable to the exercise of "personal preference" by white families, who declined to move into the area.[63] It concluded on this basis that the school board had in no way "caused or contributed to the patterns of the residential segregation which presently exist in areas of Oklahoma City," and

[62] *Dowell*, 677 F. Supp. at 1506-11, Pet. App. 5b-15b.

[63] *Dowell*, 677 F. Supp. at 1511-12, Pet. App. 15b-17b.

that the board's prior segregative acts had become too attenuated to hold the board responsible for the virtually all-black enrollments at ten elementary schools under the 1984 plan.[64]

The district court's critical subsidiary fact-finding about the nature and cause of the current virtually all-black demography of the "northeast quadrant" was based entirely upon the testimony of one witness called by the school board, Dr. William Clark.[65] However, the court's finding is inconsistent with the testimony of Dr. Clark, who recognized that what he termed "white preference" did not exist in a vacuum but could be overlaid upon a pattern of residential demography rooted in discrimination:

[64] *Dowell*, 677 F. Supp. at 1512-13, Pet. App. 17b-18b.

[65] *See* 677 F. Supp. at 1511-12, Pet. App. 15b-17b.

Q. So that we -- is it your opinion that one would not expect, based on those surveys and your knowledge and the opinions you have expressed, that whites would move into the established black residential areas in Oklahoma City after 1950 or 1960, whatever point we want to take and look at the areas of concentrations?

A. Generally, that's correct.

Q. And does it not therefore follow that, to the extent that past discrimination was a factor in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of whites to moving in unless and until their black residents move somewhere else?

A. I think that you would have to agree with that, given what I've testified. Yes.

Tr. [June 15, 1987] 106.

This evidence from Dr. Clark was uncontradicted, and it amply portrays the continuing contribution of the school board's and other official bodies' discriminatory acts to the current residential and elementary school demography of the northeast quadrant. The court below

was therefore correct in applying the teaching of *Swann* to conclude that the 1984 plan "fail[ed] to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artifical racial separation."[66] Whatever the case may be with respect to other jurisdictions where no findings of residential impact were ever made,[67] on this record the continuing responsibility of the school board for the one-race enrollments of "northeast quadrant" elementary schools is beyond dispute, and the judgment below is correct.

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[66] *Dowell*, 890 F.2d at 1503, Pet. App. 40a, *quoting Swann*, 402 U.S. at 28.

[67] See, *e.g.*, *supra* note 39.

Conclusion

For the foregoing reasons, Respondents respectfully pray that the writ be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, ETC., *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, ETC., *et al.*,

Defendants.

[Filed Jan. 18, 1977]

ORDER TERMINATING CASE

There is now pending before the Court a Motion by the defendant to close the case. A hearing has been conducted by the Court to receive the evidence of both plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools.

The Court has carefully reviewed this evidence and all of the reports it has received from the defendant and the Biracial Committee since the inception February 1, 1972 of "A New Plan of Unification for the Oklahoma City Public School System," commonly known as the Finger Plan. The Court has concluded that this was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.

Constitutional principles so bitterly contested by former members of the Board have now become a part of the fabric of the present school administration. The only standard ever imposed by the Court has been obedience to the Constitution. The School Board, as now constituted, has manifested the desire and intent to follow the law. The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimina-

tion so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

Dated this 18th day of January, 1977.

/s/ Luther Bohanon
United States District Judge